(14,431.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 358.

MARY T. HAYS, ISABELLA G. KRAGER, THOMAS D. MANN, AND EDWARD H. MANN, AN INFANT, BY HIS GUARDIAN, MARY T. HAYS, PLAINTIFFS IN ERROR,

vs.

EDWARD STEIGER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 10, 1894.

a No. 11295.

In the Supreme Court of the State of California.

MARY T. HAYS *et als.*, Plaintiffs and Appellants,
v.
EDWARD STEIGER, Defendant and Respondent.

Transcript on Appeal.

James A. Waymire and Frederic Hall, attorneys for appellants; Henley & Oates, attorneys for respondent.

Endorsed: Filed this 20th day of September, 1885. J. W. McCarthy, clerk, by John Skilsby, deputy clerk.

1 In the Supreme Court of the State of California.

Transcript on Appeal.

In the Superior Court of the County of Sonoma, State of California.

MARY T. HAYS, ISABELLA G. KRAGER, THOMAS D. MANN, and Edward H. Mann, an Infant, by his Guardian, Mary T. Hays, Plaintiffs,
vs.
EDWARD STEIGER, Defendant.

Complaint.

The said plaintiffs, Mary T. Hays, Isabella G. Krager, Thomas D. Mann, and Edward H. Mann, an infant, by his guardian,
2 Mary T. Hays, complains of the said defendant, Edward Steiger, and for cause of action avers:

1st. That plaintiff, Mary T. Hays, was the wife and is now the widow of one John Mann, who died intestate in said county and State, on the 25th day of July, 1872. That subsequent thereto she intermarried with one Thomas Hays, who died in said county and State, on the 1st day of November, 1883.

2d. That said plaintiffs, Isabella G. Krager, Thomas D. Mann and Edward H. Mann, are the legitimate children and issue of the marriage of said Mary T. Hays with the said John Mann.

3d. That the said plaintiff, Edward H. Mann, was of the age of eighteen years only, in the month of May last.

4th. That on the 29th day of January, 1885, at the county aforesaid, the above-named Mary T. Hays was duly appointed by the said superior court, guardian *ad litem* of the property of said Edward H. Mann for the purpose of this action.

5th. That the said plaintiff, Isabella G. Krager, is the wife of one Henry Krager; that the property herein claimed by her is her separate property and that her said husband has no interest therein.

6th. That the said John Mann was the head of a family and a citizen of the United States, on and before the first day of February, 1863, and entitled by the laws in force in said State, to enter, possess and settle upon the public lands thereof. That in said month and year 1863, he did in good faith enter and settle upon, and pos-
3 sess in good faith a certain tract of public land, containing one hundred and sixty acres only, situated in said county and State; that the said land was by him marked by metes and bounds so that the same could be readily traced, and the extent easily known; that he filed in the office of the recorder of said county his affidavit setting forth that his lines did not embracé more than one hundred and sixty acres of land; and that he held no other claim under the possessory act, and that according to his best knowledge and belief, said land was not claimed under any existing title, which possessory claim was filed and recorded in April, 1863, in Liber 3 of Possessory Claims; that within ninety days thereafter he put thereon improvements to the value of two hundred dollars; that he built a dwelling-house thereon, and inhabited and improved the same until the day of his death; that he was not the proprietor of three hundred and twenty acres of land in any State or Territory; that he did not quit or abandon his residence on his own land to reside on the said public land of said State; nor had he had any other pre-emption claim or right by virtue of the provisions of the pre-emption laws; that the said one hundred and sixty acres of land as located and possessed by said John Mann embraced, besides other lands, what is known as lots number (7) seven, (10) ten, (11) eleven and (12) twelve of section No. (23) twenty-three, west of Mount Diablo meridian; which lots contain one hundred and ten
4 acres and eighty-one one-hundreths (110.81) and that said John Mann did and performed all acts requisite to hold and to be entitled to purchase said tract of land from the Government of the United States. That he also filed for record in said county in legal form a homestead claim, on the 17th of April, 1863, and which was recorded in the office of the recorder of said county on the 25th of said April, and the land described in said claim is the same land filed upon and claimed by the heirs of said John Mann, before the register and receiver at San Francisco, in the United States land office.

7th. That the said plaintiffs as heirs of the said John Mann, filed under the pre-emption laws a declaratory statement, on the 28th day of October, 1880, (which was within three months after the plat of the township was filed) in the said land office, alleging the settlement on said land by the said John Mann as aforesaid, and claiming the right to purchase the said land by virtue of said settlement, and gave notice of their intention to claim said land, of one hundred and sixty acres. That said plaintiffs introduced and gave in evidence before the said register and receiver of said land office full and complete proof of the settlement and improvements on the said land by said John Mann, which was sufficient in fact and in law to entitle them to purchase said land according to their claim.

8th. That the defendant, Edward Steiger, entered on said
5 land of one hundred and sixty acres in 1870, and not earlier, while the said John Mann was living thereon with his family; and on the 8th day of November, 1880, filed in said land office an application claiming as a homestead the said tract of one hundred and ten acres and eighty-one hundredths, besides other land.

9th. That the said defendant and his wife conveyed a part of said land included in his homestead claim to G. W. Whitman, on the 9th day of July, 1874, which deed of conveyance is now of record in said county; and that no reconveyance has ever been made to said Steiger by said Whitman; and which conveyance forfeited the claim of said defendant under the provisions of the law.

10th. That such proceedings were had before the said register and receiver in reference to the rights of the said plaintiffs and the said defendant Steiger to the said one hundred and sixty acres of land; that upon the 11th day of April, 1882, a decision was rendered and made awarding to the plaintiffs a part of said tract known and designated by the United States as lot No. 4, of section 22, and lot No. nine (9) of section 23, west of the Mount Diablo meridian, and awarding to the said defendant said lots number 7, 10, 11 and 12, containing the amount 110.80 acres.

That said decision was made and rendered upon the ground that the said 110.80 acres were situated within the exterior boundary of the Mexican grant called Agua Caliente, and not subject to entry by any one at the time of the said entry and settlement
6 of the said John Mann, and that the rights of defendant were prior in time.

11th. That the said rancho, called Agua Caliente, was granted to one Lazaro Piña on the 13th day of October, 1840, by Governor Alvarado, and approved by the departmental assembly, October 8th, 1845. That said grant was for a specific quantity, namely, two and one-half (2½) leagues in length and one-quarter (¼) of a league in width, with boundaries as follows: On the southwest by the arroyo of the rancho of Petaluma, and southeast by the town of Sonoma; on the north by the hills and mountains which intervene and separate the rancho of George Yount; and on the northwest by the rancho of John Wilson.

12th. That from the facts shown and proved before the said register and receiver, it is clear, and beyond question, that said one hundred and sixty acres of land were never within the exterior boundaries of said rancho Agua Caliente, but, on the contrary, were, as a matter of fact and by law, without the same, and subject to entry and settlement, when the said John Mann entered and settled thereon.

13th. That the said plaintiffs appealed from said decision of the said register and receiver to the Commissioner of the United States Land Office at Washington, D. C., and, upon a review of the same, the said Commissioner did, on the 31st day of January, 1883, reverse and modify said decision, and made and rendered a
7 decision awarding to the said plaintiffs the said lands in lots numbers 7, 10, 11 and 12, as aforesaid, in section No. 23; and

that said land was not within the exterior boundaries of said rancho Agua Caliente, and that the said settlement of the said John Mann was good and valid in law, and prior to that of said defendant.

14th. That the said Steiger did appeal from the decision of the said Commissioner to the Secretary of the Interior of the United States, and that said Secretary did, on the 2d day of June, 1884, reverse and modify said decision, and did decide that said land herein claimed was within the exterior boundaries of the rancho Agua Caliente aforesaid, and did award the same to the said defendant Steiger.

15th. That subsequent thereto the said defendant, Steiger, did obtain from the United States Government a patent for said land herein claimed, besides other land; whereby the said Government did convey to said Steiger in fee said lands; which patent bears date seventeenth day of November, 1884, and is recorded in the recorder's office in the county aforesaid.

16th. That said Secretary had no jurisdiction of said proceedings on appeal, and that the said decision of the said Commissioner became and was final, and should and ought to stand as such and as valid in law.

17th. That if the said Secretary had jurisdiction of the said subject-matter, plaintiffs aver that his said decision was erro-
8 neous in law and is not supported by the facts in the case; that, as a matter of fact and law, he should have held and decided that said land herein claimed was not within the exterior boundaries of said Mexican grant, and that the same was subject to entry and settlement when the said John Mann settled thereon, and that the plaintiffs herein were entitled to the lands claimed by them before said several offices of the Government.

18th. That said Secretary should have decided that said Steiger was not entitled to the said land under the facts proved in said proceedings; and plaintiffs aver that various questions of law were decided by the said Secretary, erroneously and against the rights of these plaintiffs.

19th. That plaintiffs hereby offer to pay and tender the same amount of money which it legally cost the said defendant to procure said patent, or such sum of money as may be shown to and adjudged by this honorable court as a just remuneration therefor.

Wherefore, plaintiffs pray that the said defendant Steiger, be adjudged to be a trustee, and as holding said land embraced within said lots Nos. 7, 10, 11, and 12, section No. 23, in trust, and for the benefit of said plaintiffs, and that the said defendant be adjudged to convey and transfer to the said plaintiffs said land, and to execute a good and sufficient deed in law therefor, and that upon his refusal so to do, that a commissioner be appointed by this
9 honorable court to execute the same; and plaintiffs further pray for all costs in this behalf expended, and for such other and further relief as may seem meet and just to this honorable court.

JAMES A. WAYMIRE AND
FREDERIC HALL,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA, } ss:
County of Sonoma, }

Mary T. Hays, being duly sworn, deposes and says, that she is one of the plaintiffs in the above-entitled action; that she has read the above complaint, and knows the contents thereof, that the same is true of her own knowledge, except as to matters which are therein stated, on information and belief, and as to those matters that she believes it to be true.

MARY T. HAYS.

Subscribed and sworn to, before me, this 29th day of January, 1885.

J. F. MULGREW,
County Clerk.

Filed January 29th, 1885.

J. F. MULGREW, *Clerk.*

(Title of Court and Cause.)

Demurrer.

Now comes the defendant and demurs to the plaintiffs' complaint herein.

1st. Because the court has no jurisdiction of the subject-matter of the action.

2d. Because said complaint does not state facts sufficient to constitute a cause of action.

3d. Because the said complaint is ambiguous, unintelligible and uncertain in this:

That it is impossible to determine therefrom what lands are the subject-matter of the action.

That it does not show what errors in the decision of the honorable Secretary of the Interior are complained of, nor designate the same.

Wherefore, the defendant prays judgment of his demurrer, and that he be discharged hence.

HENLEY & OATES,
Defe'l's Att'ys.

(Endorsed:) Filed — 5, 1885. J. F. Mulgrew, clerk, by L. W. Juilliard, deputy clerk.

(Title of Court and Cause.)

Order.

FEBRUARY 16, 1885.

This cause coming on regularly this day on defendant's demurrer to plaintiffs' complaint, Frederick Hall, Esq., appearing as counsel for plaintiffs, and Henley & Oates, Esqs., for defendant. Whereupon, after argument of counsel, plaintiffs confess error, and, upon motion, it is ordered that the plaintiffs be, and they are hereby, allowed ten days to amend the complaint herein.

Minutes C., page 381.

11 (Title of Court and Cause.)

Amended Complaint.

Now come the plaintiffs, in the above-entitled action, and, by leave of the court, first had and obtained, file this, their amended complaint, and for cause of action allege:

1. That plaintiff, Mary T. Hays, was the wife and is now the widow of one John Mann, who died intestate in said county and State, on the 25th day of July, 1872. That subsequently thereto she intermarried with one Thomas Hays, who died in said county and State, on the first day of November, 1883.

2. The said plaintiffs, Isabella G. Krager, Thomas D. Mann and Edward H. Mann, are the legitimate children and issue of the marriage of said Mary T. Hays with the said John Mann.

3. That the said plaintiff, Edward H. Mann, was of the age of eighteen years only in the month of May last.

4. That on the 29th day of January, 1885, at the county aforesaid, the above-named Mary T. Hays was duly appointed by the said superior court guardian *ad litem* of the property of said Edward H. Mann, for the purposes of this action.

5. That the said plaintiff, Isabella Krager, is the wife of one Henry Krager; that the property herein claimed by her is her separate property, and that her said husband has no interest therein.

12 6. That the said John Mann was of the age of twenty-one years, and the head of a family, and a citizen of the United States, on and long before the first day of February, 1863. That in said month and year 1863, he did enter in good faith upon, and settle upon, and did possess in good faith, a certain tract of public land of the United States, situate in said county and State, and known, bounded and described as follows, to wit: Beginning at a stake at the southeast corner of Dr. John H. Hill's land; thence running a southerly direction one-half mile to a stake on the east line of the rancho Agua Caliente; thence easterly one-half of a mile to a stake; thence northerly one-half of a mile to a stake; thence westwardly one-half of a mile to a stake at the place of beginning, and containing one hundred and sixty acres. That said tract of land was not included in any reservation by any treaty, law or proclamation of the President of the United States, for any purpose. That said tract of land was not included within the limits of any incorporated town, nor selected as the site of any city or town. That said tract of land had not then been settled upon nor occupied for the purposes of trade or business. That said tract of land did not have thereon any known salines or mines. That he, said Mann, did inhabit and improve said one hundred and sixty acres of land, and did erect thereon a dwelling-house, and did make improvements thereon to the value of more than five hundred dollars. That said

13 Mann was not the proprietor of three hundred and twenty acres of land in any State or Territory; that he did not quit or abandon his residence on his own land to reside on the public lands in the said State. That the said tract of one hundred

and sixty acres. at the time of said entry, settlement and possession, was subject to pre-emption and settlement, but was unsurveyed land of the United States. That the said Mann continued to reside with his family on said land from the time of his settlement thereon until the day of his death.

7. That on the 16th day of August, 1880, the approved plat of township (6) six north, of range 6 west, Mount Diablo meridian, of the United States survey, was received and filed in the district land office, at San Francisco, State aforesaid.

8. That the said plaintiff, Isabella G. Krager, being unmarried, and as Isabella G. Mann, did, on the 27th day of October, 1880, for and on behalf of the heirs of the said John Mann, make her declaratory statement before the United States register and receiver, at said district land office, claiming said one hundred and sixty acres of land, as a pre-emption right, under section 2259 of the Revised Statutes of the United States, for the benefit of said heirs; which land was designated in her said declaratory statement as lots numbers 4 and 5 of section 22, and lots numbers 7, 9, 10, 11, 12, 13 and 22 of section 23, in said township 6 north, of range 6 west, Mount Diablo meridian. That she did also file in said district land
14 office all the necessary papers and proofs to complete said claim, and she then and there did tender to the said register and receiver the sum of one hundred and thirty-eight dollars and seventy-five cents in payment for 110.81 acres, hereinafter mentioned, at the rate of one dollar and twenty-five cents per acre, and the necessary amout for the legal costs, which the said register or receiver then and there refused to accept.

9. That the defendant entered on a portion of said 160 acres of land while the said John Mann and his family were living thereon, against the will and consent of the said John Mann, and against the will and consent of said plaintiffs, in the year 1870, and not earlier, and continued thereon against the will and consent of said John Mann and of said plaintiffs. And that said defendant and his wife conveyed a part of said land included in his homestead claim to George W. Whitman on the 9th day of July, 1874, which deed of conveyance is now of record in said county, and that no reconveyance has been made to said defendant by said Whitman, nor by any other person, and which conveyance forfeited the claim of said defendant.

10. That on the 8th day of November, 1880, the said defendant filed in said land office an application claiming as a homestead a large portion of said tract of 160 acres, to wit: said lots num-
15 bers 1, 3, 6, 7, 10, 11, 12 and 14 of section 23 in said township. That said defendant claimed as against the said plaintiffs a right to the land in said contest between him and said plaintiffs, upon the ground that he was a purchaser of the land within his homestead entry from parties who were the assigns or vendees thereof by virtue of a purchase from one Lazaro Piña as grantee in the Mexican grant known and called the Rancho Agua Caliente, granted by one Alvarado as governor of California; and which land so claimed by said defendant was, as he alleges, within

the exterior boundaries of said grant, but upon the final and approved survey thereof by the United States Government the said land was excluded therefrom.

11. That the said Mexican grant, now lying within said county, was granted to said Piña by said Alvarado on the 13th day of October, 1840, and approved by the departmental assembly on the 8th of October, 1845. That said grant was confirmed by the United States district and supreme courts to the claimant thereof as follows:

"The land of which confirmation is made is situated in the present county of Sonoma, and is of the extent of two leagues and a half in length by a quarter of a league in width, and known by the name of Agua Caliente, and is bounded on the southwest by the arroyo of the rancho of Petaluma; on the southeast by the town of Sonoma; on the north by the hills and mountains which
16 intervene and separate the rancho of George Yount; and on the northwest by the rancho of Mr. John Wilson, being the same land which was granted to Lazaro Piña by Governor Alvarado."

12. That the United States official survey of said Agua Caliente grant was made by —— Lewis in the month of December, 1870, and which survey was afterwards finally approved. That by said survey the said arroyo mentioned in said grant was made a fixed boundary on the westerly side thereof; that said survey embraced two and one-half leagues in length along and nearly parallel to the general course of said arroyo, and a width of one-quarter of a league on the easterly side of said arroyo; that said eastern line of said survey was situate and run west of the so-called Napa hills. That upon the publication of said survey of Lewis, objections were filed thereto by said defendant and others claiming that the said eastern boundary did not extend far enough to the east to protect them. That upon the 21st day of February, 1878, the Commissioner of the United States Land Office at Washington did make and render a decision holding that the said grant of Agua Caliente was a grant limited for quantity by the calls of the title papers and decree of the United States courts to 2½ leagues in length by ¼ of a league in width; that said arroyo mentioned in said grant was the westerly exterior boundary thereof; that said survey of Lewis contained said quantity; that said eastern line was an exterior boundary of said grant according to the calls thereof; that said survey should
17 be approved, and the same was by said Commissioner approved. Said Commissioner further decided in said proceedings that the boundary described in the said decree as the northern must be regarded as the eastern boundary; and that it is a well-settled rule that where hills or mountains are described as the locative calls of a grant, the boundary must follow along the foot or base of such hills or mountains, and which rule the said Commissioner did apply to the construction of the boundaries of the said Agua Caliente grant; all which decisions of the said Commissioner were confirmed by the then Secretary of the Interior of the United States at Washington, on the 9th day of January, 1879.

13. That in the said contest between the said defendant and the said plaintiffs in the said district land office, the United States register and receiver did decide, on the 11th day of April, 1882, that the said John Mann was a naturalized citizen of the United States, and the head of a family; that he was entitled to hold by pre-emption 160 acres of the public land of the United States; that he had settled upon, inhabited, improved, built a dwelling upon said 160 acres, and that he had performed all the acts necessary to hold land as a pre-emptioner; and that thereby the said plaintiffs were entitled to purchase under the pre-emption laws a part of said tract, to wit, said lots known and designated as lot number (4) four of section 22, and lot number (9) nine of section 23 in said township 6; that the said defendant was entitled to purchase lots number 7, 10, 11 and 12 of
18 section 23 in said township, containing 110.81 acres. That said decision in favor of said defendant was made upon the ground that the said defendant was a purchaser in good faith under the said Mexican grant of Agua Caliente; that the said 110.81 acres, as a fact, were outside of the said Lewis survey, but, as a matter of law, the said eastern line of said survey was not an exterior boundary of said tract, and that the foot of said hills or mountains on the eastern side was not an exterior boundary of said grant, but that, on the contrary, as a matter of law, that the tops of said hills and mountains were an exterior boundary of said grant; and that, as a matter of law, the claim of said defendant came within the provisions of section seven of the act of the United States Congress passed July 23, 1866, entitled "An act to quiet titles in California," because, as a matter of law, the said land had been excluded from the final survey of said grant Agua Caliente. And, that had it not been for said ground, the said plaintiffs would have been entitled to purchase the said 110.81 acres.

14. That an appeal was taken by the said plaintiffs from the said decision of the said register and receiver to the United States Commissioner of the Land Office at Washington, District of Columbia. That the said Commissioner did, on the 31st day of January, 1883, upon a review of said decision, modify and reverse the same, and did decide and award to said plaintiffs the said lots of land, containing
19 110.81 acres, to wit, Nos. 7, 10, 11 and 12, in said section 23 and township 6. And the said Commissioner did decide as a matter of law, that the decision of his said predecessor, to wit, made as aforesaid, on the 21st day of February, 1878, was correct in every particular, as to the exterior boundaries of said Agua Caliente grant.

15. That the said defendant did appeal from the said decision of the said Commissioner to the Secretary of the Interior of the United States; that said Secretary did, on the 2d day of June, 1884, reverse and modify said last decision, and did decide in favor of said defendant and award to him said lots Nos. 7, 10, 11 and 12, in said section 23. Said Secretary did decide as a matter of law, that the tops of said hills and mountains on the eastern side of said grant, was the eastern exterior boundary of said grant as granted by the said Governor Alvarado; that the said lots containing 110.81 acres

were excluded as a matter of law from the final survey of said Mexican grant; and that by virtue of the seventh section of the act of Congress of July 23rd, 1866, aforesaid, and by the purchase defendant made from the assigns or vendees of the grantee in said Mexican grant, that he, defendant, was entitled to purchase from the United States Government, said lots containing 110.81 acres.

16. That subsequent thereto, said defendant did obtain from the United States Government a patent for said land herein claimed, to wit, said 110.81 acres, besides other lands therein described; whereby the said Government did convey to said defendant in fee said lands, which patent bears date, the seventeenth day of November, 1884, and is recorded in the recorder's office of said county.

17. Plaintiffs hereby aver and assign as errors in law, 1st. That the said Secretary of the Interior never had and has not now any jurisdiction over the said question as to what are the exterior boundaries of said Mexican grant called Agua Caliente. 2d. That the questions of law as to what were and are the exterior boundaries of the said Mexican grant Agua Caliente were finally determined by the United States Land Commissioner, as aforesaid, on the 21st day of February, 1878, in said proceedings between all persons and the United States Government, and affirmed by the then Secretary of the Interior, to wit, on the 9th day of January, 1877. That from that time the said question as to the eastern exterior boundary of said grant was final and *res adjudicata*, as against everybody. 3rd. That if the said Secretary of the Interior, who attempted to determine said matter on the said 2nd day of June, 1884, did have jurisdiction thereof, he erred in law in deciding that the tops of the hills and mountains on the easterly side of said grant were an exterior boundary of the Mexican grant Agua Caliente. 4th. He erred in not deciding that the eastern line of said survey of said Lewis was the eastern exterior boundary of said grant. 5th. That if, as a matter of law, said eastern line run as aforesaid by said Lewis, is not the eastern exterior boundary of said grant, then the said Secretary erred in not deciding that the foot of said hills and mountains was the eastern exterior boundary of said grant. 6th. If said Secretary had jurisdiction, he erred in not awarding to plaintiffs the right to purchase under the pre-emption laws, the said lots numbers 7, 10, 11 and 12, of section 23 in said township. 7th. Said Secretary erred in not holding that said conveyance to G. W. Whitman, by said defendant, forfeited his homestead claim.

18. The said plaintiffs hereby offer to pay and hereby tender the amount of money which it legally cost the defendant to procure said patent, or such a sum of money as may be shown to and adjudged by this honorable court as a just remuneration therefor.

Wherefore, plaintiffs pray that the said defendant be adjudged to be trustee and as holding said land embraced within said lots Nos. 7, 10, 11 and 12, of section No. 23 in said township in trust and for the benefit of said plaintiffs; and that defendant be adjudged to convey and transfer to the said plaintiffs said land, and to execute

a good and sufficient deed in law therefor, and that upon the refusal of said defendant so to do, that a commissioner be appointed, by this honorable court, to execute the same; and plaintiffs further pray judgment for all costs in this behalf expended, and for
22 such other and further relief as may seem meet and just to this honorable court.

JAMES A. WAYMIRE AND
FREDERIC HALL,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Isabella G. Krager, being duly sworn, deposes and says, that she is one of the plaintiffs in the above-entitled action; that she has read the above and foregoing amended complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters, she believes it to be true.

ISABELLA G. KRAGER.

Subscribed and sworn to before me this 19th day of February, 1885.
[SEAL.] EDW'D CHATTIN,
Notary Public.

Service of the within amended complaint admitted this 25th day of February, 1885.

HENLEY & OATES,
Att'ys for Defendant.

(Endorsed:) Filed February 25th, 1885. J. F. Mulgrew, clerk, by L. W. Juilliard, deputy clerk.

23 (Title of Court and Cause.)

Demurrer to Amended Complaint.

And now comes the defendant and demurs to the plaintiffs' amended complaint herein.

1st. Because the same does not state facts sufficient to constitute a cause of action.

2d. Because the court has no jurisdiction of the subject-matter of the action.

3d. Because said amended complaint is unintelligible, ambiguous and uncertain in this, that it cannot be determined therefrom what errors of law or of fact are claimed to have been made by the Secretary of the Interior.

And in this that it cannot be determined therefrom what thing or matter was decided by the officers of the Land Department which is claimed therein to be error.

Wherefore defendant asks judgment of his demurrer and that he be discharged with his reasonable costs.

HENLEY & OATES,
Defendant's Attorney-.

Filed this 26th day of Feb., 1885.

J. F. MULGREW, *Clerk.*
By L. W. JUILLIARD, *Deputy Clerk.*

24 (Title of Court and Cause.)

Order Sustaining Demurrer.

The court is of the opinion that the Seceetary of the Interior had jurisdiction to determine the controversy as to the land sued for in this case, when that controversy was before the Land Department of the Government of the United States, and that it is not shown by the complaint that there was any mistake either in law or fact as to the location of the land when it was awarded to the defendant. It is ordered that the demurrer be sustained. Plaintiff is allowed ten days to amend if he is so minded.

JNO. G. PRESSLEY,
Sup. Judge.

(Endorsed:) Filed June 3, 1885. J. F. Mulgrew, clerk, by L. W. Juilliard, deputy clerk.

(Title of Court and Cause.)

24½ *Order Allowing Plaintiffs up to and including June* 22, 1885, *to Amend.*

Upon motion of W. W. Porter, Esq., specially appearing for J. A. Waymire and Frederic Hall, Esqrs., attorneys for plaintiffs, Henley & Oates, appearing for defendant, it is ordered that plaintiffs be allowed up to, and including June 22, 1885, to amend their complaint. The attorneys for defendants waive service of notice of extension of time, and it is so ordered.

June 16, 1885.

(Title of Court and Cause.)

Judgment by Default.

In this action, the defaults of Mary T. Hays, Isabella G. Krager, Thomas D. Mann, and Edward H. Mann, an infant, by his guardian, Mary T. Hays, plaintiffs, for not amending their complaint herein, having been entered on the 23d day of June, 1885, upon motion of Henley & Oates, attorneys for defendant, in open court:

25 Wherefore, by reason of law and the premises aforesaid, it is ordered, adjudged and decreed that Edward S. Steiger, the defendant, do have and recover of and from Mary T. Hays, Isabella G. Krager, Thomas D. Mann, and Edward H. Mann, an infant, by his guardian, Mary T. Hays, the plaintiffs, the sum of six and $\frac{65}{100}$

($6.65) dollars, the same being defendant's costs and disbursements incurred in this action.

Judgment entered June 23, 1885.

(Title of Court and Cause.)

Notice of Appeal.

You will please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of the State of California from the judgment made and entered in the said superior court, on the twenty-third day of June, 1885, in favor of the defendant in said action, and against said plaintiffs, and from the whole thereof.

Dated this 14th day of July, 1885.

Yours, etc.

JAS. A. WAYMIRE AND
FREDERIC HALL,
Attorneys for Plaintiffs.

To the clerk of the said superior court, and to Messrs. Henley & Oates, attorneys for defendant, Edward Steiger.

26 (Endorsed:) Filed July 25, 1885. J. F. Mulgrew, clerk, by L. W. Juilliard, deputy clerk.

Due service and receipt of a copy hereof admitted after filing, this 25th day of July, 1885.

HENLEY & OATES,
Attorneys for Defendant.

(Title of Court and Cause.)

Stipulation.

It is stipulated that the foregoing is a correct statement and transcript of the judgment roll and notice of appeal, in said case, and the same is hereby certified as correct; and that a sufficient undertaking on appeal, in due form of law, has been given and properly filed, in said case, in due time according to the law.

JAMES A. WAYMIRE AND
FREDERIC HALL,
Attorneys for Appellants.
HENLEY & OATES,
Attorneys for Respondent.

27 Service of a copy of the within admitted this 18th day of September, 1885.

HENLEY & OATES,
Attorney- for Respondent.

STATE OF CALIFORNIA, }
County of Sonoma, } ss:

Received of the appellants 2 copies of the within transcript on appeal this 18th day of September, A. D. 1885.

J. F. MULGREW, *Clerk,*
By L. W. JUILLIARD, *Dep. Clerk.*

28 *Submission of Cause.*

In the Supreme Court, State of California, Department Two.

HAYS *et al.* vs. STEIGER. } 11295.

1888, March 5. On motion of Waymire, ordered respondent be allowed 15 days to file brief, appellant 10 days to reply; cause to be thereupon submitted.

Title of Court and Cause.

1888, April 20. Cause ordered submitted.

THE COURT. (2)

29 In the Supreme Court of the State of California, Department Two.

MARY T. HAYS *et als.*, Appellants, vs. EDWARD STEIGER, Respondent. } No. 11295. On Appeal from the Superior Court in and for the County of Sonoma.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court; whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the county of Sonoma in the above-entitled cause, be and the same is hereby affirmed.

30 *Opinion.*

In the Supreme Court of the State of California, Department Two.

(Filed June 13, 1888.)

MARY T. HAYS *et al.* vs. EDWARD STEIGER. } No. 11295.

The plaintiffs are the heirs-at-law of one John Mann, who died intestate on the 25th day of July, 1872. Mann was a qualified pre-emptor, and in 1863 settled upon a tract of unsurveyed land in the county of Sonoma. He erected improvements on the land and continued to reside thereon with his family until the time of his death. The township in which the land was situated was afterward surveyed, and on the 16th of August, 1880, an improved plat thereof was filed in the United States land office at San Francisco. On the 27th of October, 1880, one of the plaintiffs, for and on behalf of the heirs of Mann, filed with the register and receiver of the land office a declaratory statement claiming the right to pre-empt, for the use and benefit of the said heirs, one hundred and sixty acres

of land, which was described as lots 4 and 5 of section 22, and lots 7, 9, 10, 11, 12, 13 and 22 of section 23, in township 6 north, etc.

In 1870 the defendant entered upon a part of the land claimed by Mann, and thereafter resided thereon. On the 8th of November, 1880, he filed in the land office an application for a homestead on land described as lots 1, 3, 6, 7, 10, 11, 12, and 14 of section 23 in township 6 north, etc. The land applied for by both parties to the extent of 110.81 acres was the same. The defendant claimed that, under the provisions of section 7 of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California," he had a right to purchase all the land applied for by him for the reason that the same was within the exterior boundaries of a Mexican grant, known as Agua Caliente, but was excluded therefrom upon final survey by the Unired States, and he was a *bona fide* purchaser thereof for a valuable consideration from parties who purchased from the original grantee of the grant.

The contest between the parties as to which had the right to enter the land was tried before the register and receiver of the land office, and the decision was in favor of the defendant. From that decision an appeal was taken to the Commissioner of the General Land Office, and he reversed the decision of the register and receiver, and entered one in favor of the plaintiffs. An appeal was then taken to the Secretary of the Interior, and that officer reversed the decision of the Commissioner and affirmed that of the register and receiver. Subsequently a United States patent was regularly issued to the defendant.

The plaintiffs claim that they have an equitable right to the 110.81 acres of land in dispute, and they brought this action to charge the defendant as trustee of the title and to compel its transfer to them.

The defendant demurred to the complaint and the demurrer was sustained. The plaintiffs declined to amend and thereupon judgment was entered against them. The appeal is from the judgment.

It is not claimed for the appellants that the respondent holds the title in trust for them, if the land was in fact within the exterior boundaries of the Agua Caliente grant. Nor is it claimed that the courts can review the action of the officers of the Land Department in so far as their decisions are based upon questions of fact, the rule to the contrary being well settled. (Shepley *vs.* Cowan, 91 U. S., 330, 340; Quinby *vs.* Conlan, 104 U. S., 420, 426.)

But it is insisted that the land was not within the exterior boundaries of the grant, and that the register and receiver and Secretary of the Interior erred, as a matter of law, in holding that it was, and awarding it to the respondent. And this presents the principal question for consideration.

The complaint alleges that the grant, known as Agua Caliente, was made to Lazaro Piña by Alvarado as governor of California on the 13th day of October, 1840, and approved by the departmental assembly on the 8th of October, 1845, and that it was confirmed by the United States district and supreme courts to the claimant thereof, as follows:

"The land of which confirmation is made is situated in the present county of Sonoma and is of the extent of two leagues in length by a quarter of a league in width, and known by the name of Agua Caliente, and is bounded on the southwest by the arroyo of the rancho of Petaluma; on the southeast by the town of Sonoma; on the north by the hills and mountains which intervene and separate the rancho of George Yount; and on the northwest by the rancho of Mr. John Wilson, being the same land which was granted to Lazaro Piña by Governor Alvarado."

It is then alleged that the official survey of the grant was made by one Lewis in the month of December, 1870, and was afterward fully approved; "that by said survey the said arroyo mentioned in said grant was made a fixed boundary on the westerly side thereof; that said survey embraced two and one-half leagues in length along and nearly parallel to the general course of said arroyo, and a width of one-quarter of a league on the easterly side of said arroyo; that said eastern line of said survey was situate and run west of the so-called Napa hills; that upon the publication of said survey of Lewis, objections were filed thereto by said defendant and others claiming that the said eastern boundary did not extend far enough to the east to protect them." It is further alleged that on the 21st of February, 1878, the Commissioner of the General Land Office made a decision "holding that the grant of Agua Caliente was a grant limited for quantity by the calls of the title papers and decree of the United States courts to two and one-half leagues in length by one-quarter of a league in width; that said arroyo mentioned in said grant was the westerly boundary thereof; that said survey of Lewis contained said quantity; that said eastern line was an exterior boundary of said grant according to the calls thereof; that said survey should be approved and the same was by said Commisssoner approved;" that the Commissioner further decided "that the boundary described in the said decree as the northern must be regarded as the eastern boundary; and that it is a well-settled rule that when hills or mountains are described as the locative calls of a grant, the boundary must follow along the foot or base of such hills or mountains;" all of which decisions were confirmed by the Secretary of the Interior on the 9th of January, 1879.

The above are all of the averments found in the complaint in reference to the confirmation and location of the grant. Now, conceding that the hills or mountains mentioned in the decree of confirmation as the northern boundary are really upon the east and form the eastern boundary, and that where a grant is described as bounded by hills and mountains the line runs along the base and not the summit of the hills, still we are unable to see anything showing that the land in controversy was not within the boundaries of the grant as originally made and confirmed. So far as we can see, it may lie between the eastern line of the survey and the base of the hills. There is nothing shown to the contrary, and, as pleadings are construed most strongly against the pleader, this seems to us to constitute a sufficient answer to the appellant's contention.

The grant was evidently what is called a float; that is, a grant

of quantity only, within a larger tract, to be located by consent of the Government before it can attach to any specific land. (United States *vs.* Kate D. McLaughlin *et al.*, lately decided by U. S. Supreme Court.)

If we are right in what has been said the case is within the rules of law as declared in Hosmer *vs.* Wallace, 97 U. S., 575, and Rutledge *vs.* Murphy, 57 Cal., 388.

It is contended that the Secretary of the Interior had no jurisdiction to hear the contest between the plaintiffs and defendant upon appeal from the decision of the Commissioner.

In Hosmer *vs.* Wallace, *supra*, there was an appeal from the decision of the Commissioner to the Secretary of the Interior. That case was like this, and no question was made as to the right of appeal. As we understand it, the Secretary is at the head of the Land Department, and is clothed with supervisory power over all the rulings and acts of the Commissioner.

It is alleged in the complaint that said defendant and his wife conveyed a part of said land included in his homestead claim to George W. Whitman on the 9th day of July, 1874, which deed of conveyance is now of record in said county, and that no reconveyance has been made to said defendant by said Whitman nor by any other person. It is contended that by this conveyance defendant forfeited his right to a homestead, and in support of this position sections 2290 and 2291 of the United States Revised Statutes are cited.

The first section provides that the person applying for the benefit of the homestead act shall make affidavit "that such application is made for his exclusive use and benefit, and that his entry is made for the purposes of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person," etc. And the second section provides that no patent can be issued until the applicant "makes affidavit that no part of such land has been alienated, except as provided in section 2288. Section 2288 provides that a pre-emption or homestead claimant may transfer any portion of his pre-emption or homestead "for church, cemetery, or school purposes, or for the right of way of railroads across such pre-emption or homestead."

There are several answers to this contention:

First. It does not appear that the matter was ever presented for decision, or was decided by the register and receiver or the Commissioner or the Secretary of the Interior. The statement in the complaint, found among the alleged errors of the Secretary, that "said Secretary erred in not holding that said conveyance to G. W. Whitman by said defendant forfeited his homestead," is a mere conclusion, and not a statement of any fact. But, as the courts can only review and correct the errors of law, committed by the land officers, the facts on which those errors are supposed to be based should be fully stated. For example, it should have been alleged not only that the conveyance was made, but that the fact that it was made was proved before the land officers and found to be true, and that nevertheless the Secretary decided that it did not operate

to forfeit the defendant's right. In the absence of such a statement of the facts the question presented does not arise and cannot be considered.

Second. According to the averments of the complaint, the defendant made the conveyance complained of in 1874, and did not file his homestead claim till 1880. But the sections cited refer only to proceedings taken after the homestead claim is filed.

Third. It does not appear how large a "part" of the land was conveyed, or for what purpose. So far as we can learn from the complaint, defendant may have conveyed to Whitman a part only large enough to make a family burying ground and may have transferred it for cemetery purposes.

There are no other points that require consideration. We find no error in the record, and therefore advise that the judgment be affirmed.

BELCHER, *C. C.*

We concur—
HAYNE, *C.*
FOOTE, *C.*

The COURT: For the reasons given in the foregoing opinion the judgment is affirmed.

31 *Bond.*

In the Supreme Court of the State of California.

MARY T. HAYS, ISABELLA G. KRAGER, THOS. D. MANN, and EDWARD H. MANN, an Infant, by his Guardian, MARY T. HAYS, Pl'ffs in Error,

vs.

EDWARD STEIGER, Def't in Error.

Know all men by these presents that we, R. S. Brown and J. J. Rauer, are held and firmly bound unto Edward Steiger, defendant in error herein, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Edward Steiger, his successors or assigns; to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

32 Sealed with our seals. Dated the 15th day of May, 1890.

Whereas the above-named plaintiffs in error have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of California in the cause entitled Mary T. Hays, Isabella G. Krager, Thos. D. Mann, and Edward H. Mann, an infant, by his guardian, Mary T. Hays, plaintiffs, *versus* Edward Steiger, defendant (No. 11295)—

Now, therefore, the condition of this obligation is such that if the above-named Mary T. Hays, Isabella G. Krager, Thos. D. Mann, and Edward H. Mann, an infant, by his guardian, Mary T. Hays,

plaintiffs in error, shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

R. S. BROWN. [SEAL.]
J. J. RAUER. [SEAL.]

Signed, sealed, and delivered in presence of—
H. P. TRICON.

33 UNITED STATES OF AMERICA, }
State of California, } ss:

J. J. Rauer and R. S. Brown, being duly sworn, each for himself, *and* says that he is a freeholder in the State of California and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exempt from execution and over and above all debts and liabilities.

J. J. RAUER. [SEAL.]
R. S. BROWN. [SEAL.]

Subscribed and sworn to before me this 15th day of May, 1890.
[SEAL.] H. P. TRICON,
Notary Public.

The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Dated May 16, *May,* 1890.

Endorsed: No. 11295. In the supreme court of the State of California. Mary T. Hays *et al.*, pl'ffs in error, *vs.* Edward Steiger, def't in error. Bond on writ of error. Filed May 21, 1890. J. D. Spencer, clerk. Frank Myers, deputy.

34 In the Supreme Court of the United States of America.

MARY T. HAYES *et al.*, Pl'ffs in Error, }
vs.
EDWARD STEIGER, Def't in Error. }

Assignment of Errors.

The plaintiffs in error now specifies and assigns the following errors:

1.

The court erred in holding that the Secretary of the Interior had jurisdiction to entertain an appeal from the decision of the Commissioner of the Land Office in a contest between two claimants of public lands involving the construction of said act.

2.

The court erred in holding that the forfeiture was insufficiently alleged.

3.

The court erred in holding that the decisions of the officers
35 of the Land Office are final on matters of facts and reviewable in matters of law only.

4.

The court erred in holding that the Rev. St. U. S., sec. 2291, providing that no patent shall issue for a homestead until the applicant make affidavit that he has not alienated any part of the land except for church, cemetery or school purposes, or for right of way for a railroad, applies only to alienations made after the filing of the homestead claim.

5.

The court erred in holding that the complaint attacking a homestead patent for such alienation not averring that the alienation was not for one of the purposes excepted by said statute was therefore bad.

Wherefore plaintiffs in error pray that said judgment by the said supreme court of the State of California be reversed.

Respectfully,

J. A. WAYMIRE,
Att'y for Pl'ffs in Error.

36 Endorsed: No. 11295. Supreme court State of California. Mary T. Hays *et al. vs.* Edward Steiger. Assignment of errors. Filed May 22, '90. J. D. Spencer, clerk. By J. J. Paulsell, deputy.

37 UNITED STATES OF AMERICA, *ss:*

To Edward Steiger, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 13th day of October, A. D. 1890, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Mary T. Hays, Isabella G. Krager, Thos. D. Mann, and Edward H. Mann, an infant, by his guardian, Mary T. Hays, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of California, this 16th day of May, A. D. 1890, and of the Independence of the United States the one hundred and 14th.

Seal of Supreme Court of California.

Attest:

J. D. SPENCER, *Clerk*,
By FRANK MYERS, *Deputy.*

[Endorsed:] In the Supreme Court of the United States. Mary T. Hays *et al. vs.* Edward Steiger. Original citation. Service of a copy of within citation hereby admitted this 17 day of May, 1890. Henley & Oates, att'ys for def't in error. Filed May 21, 1890. J. D. Spencer, clerk, by Frank Myers, deputy.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of a judgment of a plea which is in the said supreme court, before you, being the highest court of law or equity of the said State in which a decision could be had between Mary T. Hays, Isabella G. Krager, Thomas D. Mann, and Edward H. Mann, an infant, by his guardian, Mary T. Hays, plaintiffs in error, and Edward Steiger, defendant in error, wherein was drawn in question the construction of the statutes of the United States relating to the pre-emption laws, and also secs. 2290 and 2291 of the U. S. Revised Statutes, and the decision was against the title and right specially set up and claimed under said statutes by plaintiffs in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 9th day of May, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Seal U. S. Circuit Court, Northern Dist. of Cal.

L. S. T. SAWYER,
Clerk U. S. Circuit Court, Northern District of California.

The above writ of error is hereby allowed.

W. H. BEATTY,
Chief Justice of California.

[Endorsed:] United States. Mary T. Hays, Isabella G. Krager, Thos. D. Mann, and Edward H. Mann, and infant, by his guardian, Mary T. Hays, pl'ffs in error, *vs.* Edward Steiger, def't in error. Writ of error. Filed May 21, 1890. J. D. Spencer, clerk; Frank Myers, deputy.

39 *Clerk's Certificate.*

In the Supreme Court of the State of California.

MARY T. HAYS *et al.*, Plaintiffs in Error,
vs.
EDWARD STEIGER, Defendant in Error. } No. 11295.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing thirty-eight pages, numbered from one to thirty-eight, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Seal Supreme Court of California.

Witness my hand and the seal of the said supreme court this 24th day of May, 1890.

J. D. SPENCER, *Clerk*,
By BEN. M. MADDOX, *Deputy*.

Endorsed on cover: Case No. 14,431. California supreme court. No. 358. Mary T. Hays, Isabella G. Krager, Thomas D. Mann, and Edward H. Mann, an infant, by his guardian, Mary T. Hays, plaintiffs in error, *vs.* Edward Steiger. Filed November 28, 1890.

Supreme Court of the United [illegible]

OCTOBER TERM 1894.

No. 359 67

MARY T. HAYS, ISABELLA G. KRAGER, THOM[illegible] MANN, AND EDWARD H. MANN, AN INFANT, [illegible] GUARDIAN, MARY T. HAYS, PLAINTIFFS IN [illegible]

vs.

EDWARD STEIGER, DEFENDANT IN ERRO[illegible]

BRIEF FOR PLAINTIFFS.

FREDERIC HALL, AND JAS. A. WAY[illegible]

Attorneys for Plaintiffs in [illegible]

(14,431)

(14,431.)

Supreme Court of the United States.

No. 358.

MARY T. HAYS, ISABELLA G. KRAGER, THOMAS D. MANN, AND EDWARD H. MANN, AN INFANT, BY HIS GUARDIAN, MARY T. HAYS,
Plaintiffs in Error,
vs.
EDWARD STEIGER,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is an action brought in the Superior Court of the County of Sonoma, State of California, by the

plaintiffs in error, claiming an equitable right to 110.80 acres of land, which is a part of a claim of 160 acres of public land pre-empted by John Mann, through whom the plaintiffs in error claim as heirs at law; and charging the defendant as trustee of the legal title, and praying that he be compelled to transfer to them the legal title to said 110.80 acres (Trans., pages 6 and 7, fols. 12, 13, 14).

The defendant demurred to the amended complaint, and the demurrer was sustained (Trans., p. 12, fol. 24).

The plaintiffs refused to amend their complaint, and the defendant had judgment on the pleadings. The plaintiffs appealed from said judgment to the Supreme Court of the State of California, where the judgment of the Court below was affirmed (Trans., pp. 14, 15, 16, 17). From that judgment the plaintiffs brought their writ of error to this Court.

John Mann, through whom plaintiffs in error claim as heirs, was a qualified pre-emptor who settled in 1863, on 160 acres of unsurveyed land in Sonoma County, which embraces the 110.80 acres in dispute herein. He made improvements and resided with his family thereon, until his death, which occurred July 25th, 1872. He died intestate.

The township in which said 160 acres of land lies was subsequently surveyed, and an approved plat thereof was filed in the United States Land Office, at San Francisco, on the 16th day of August, 1880.

On the 27th of October, 1880, one of the plaintiffs, for and on behalf of Mann, filed with the Register and Receiver of said land office a declaratory statement claiming the right to pre-empt for the benefit and use of said heirs, one hundred and sixty acres of land, which was described as lots 4 and 5 of Section 22, and lots 7, 9, 10, 11, 12, 13 and 22 of Section 23, in Township 6 north (Trans., p. 7).

Said lots Nos. 7, 10, 11 and 12 of Section 23, contain the 110.80 acres, in dispute (Trans., p. 9).

On the 8th of November, 1880, the defendant in error filed in said land office an application claiming as a homestead a certain tract of land which included the said 110.80 acres (Trans., 7, folio 15). The defendant had entered for the first time upon said land in dispute in 1870, against the will and without the consent of said Mann, or of plaintiffs. No entry of any kind was made by defendant prior to the year 1870, upon said premises.

He claimed the right to purchase the land under the provision of Section 7, of the Act of Congress of July 23rd, 1866, entitled, "An act to quiet land titles in California." Said land he claimed was within the exterior boundaries of the Mexican grant known as Agua Caliente, but which was excluded by the final survey of the United States; and that he was a *bona fide* purchaser for a valuable consideration from parties who purchased from the original grantee of said grant.

Said grant was made to Lazaro Pina by Alvarado, as Governor of California, on the 13th day of October, 1840, and approved by the departmental assembly, October 8th, 1845, and confirmed by the United States District Court and this Court, as follows:

> The land of which confirmation is made is situated in the present County of Sonoma, and is of the extent of two leagues and a half in length by a quarter of a league in width, and known by the name of Agua Caliente, and is bounded on the southwest by the arroyo of the Rancho of Petaluma; on the southeast by the Town of Sonoma; on the north by the hills and mountains, which intervene and separate the Rancho of George Yount, and on the northwest by the Rancho of Mr. John Wilson, being the same land which was granted to Lazaro Piná by Governor Alvarado.

The parties hereto proceeded to prove their respective claims before the Register and Receiver. The decision rendered by said officers was in favor of the defendants in error. Said officers decided that said plaintiffs in error would have been entitled to the 160 acres by them claimed, if the claim of defendant in error had not been made, and therefore they gave to plaintiffs in error the 160 acres less the 110.80 acres claimed as aforesaid.

An appeal was taken to the Commissioner of the General Land Office by plaintiffs in error. That officer reversed said decision of the register and receiver, and rendered one in favor of the plaintiffs in

error. A further appeal was taken to the Secretary of the Interior, who reversed the decision of the Commissioner, and affirmed that of the Register and Receiver.

Subsequently, a patent was issued to the defendant by the United States for a tract of land embracing the 110.80 acres in dispute.

But prior to all this, the defendant had his day in Court and was defeated—that is, in the land department. An official survey of the grant to Pina was was made in December, 1870, which was approved. By said survey the arroyo mentioned in said grant was made a fixed boundary on the westerly side.

The survey embraced two and one-half leagues in length along and nearly parallel to the general course of said arroyo, and one quarter of a league in width on the easterly side of said arroyo, said easterly side was situated to the west of the so-called Napa hills. Upon the publication of said survey, objections were filed thereto, by *said defendant* and others, claiming that said eastern boundary did not extend far enough to the east to protect them.

On the 21st of February, 1878, the Commissioner of the General Land Office, decided that the grant of Agua Caliente was a grant limited in quantity by the calls of the title papers and decree of the United States courts to two and one-half leagues in length by one-quarter of a league in width; that said arroyo was the westerly boundary; and that said sur-

vey contained said quantity; that said eastern line (erroneously in the grant "north") was an exterior boundary, according to the calls of the grant; that the boundary described in said decrees the *northern*, must be regarded as the *eastern* boundary; and that it is a well settled rule where hills or mountains are described as the location calls of a grant, the boundary must follow the foot or base of said hills or mountains. The Commissioner approved said survey, and on appeal to the Secretary of the Interior said decision was affirmed, on the 9th day of January, 1879 (Trans., p. 8).

Thus it appears that in the Land Department *three* decisions were made in favor of the plaintiffs in error, and *one* in favor of the defendant in error.

On the 9th day of July, 1874, the defendant and his wife conveyed a part of said homestead claim to George W. Whitman, which deed was of record in Sonoma County. Said part sold was never reconveyed to defendant (Trans., p. 7, parag. 9).

Plaintiffs in error claim that defendant had forfeited all right he may have had to a homestead, according to the provisions of Sections 2288, 2290 and 2291 of the United States Revised Statutes.

One of the main questions involved is as to the construction of the eastern boundary of the Pina grant (and whether the land in dispute was within the exterior boundaries). The grant was for a fixed quantity, with the arroyo for the westerly boundary, with the southeast boundary of the town of Sonoma.

Another important question which is involved is, could the Secretary of the Interior cancel and annul the decision of his predecessor, made January 9th, 1879?

Another question which is involved and is important, namely, can a homesteader come in and claim a homestead and obtain it, in violation of the statute which prohibits him from making a sale of any part thereof?

The question is also involved, whether the acts of defendant come within the purview of Section 7 of the Act of July 23, 1866, entitled "An Act to quiet "land titles in California," so as to entitle him, as a matter of law, to hold the land in dispute.

ASSIGNMENT OF ERRORS.

1. We assign as error on the record, that the Superior Court erred in sustaining the demurrer to the amended complaint, and the Supreme Court of the State, therefore, erred in affirming the judgment of the Court below.

2. The Superior Court erred in holding that the Secretary of the Interior's decision, made on the 2d day of June, 1884, was correct and valid, in reversing the decision of the Commissioner of the General Land Office, made the 31st of January, 1883, and the Supreme Court of the State erred in affirming said judgment of the Court below.

3. The said Superior Court erred in deciding that it was not shown in said amended complaint that there was any error in law as to the location of the land when it was awarded to the defendant in error by said Secretary, on the 2d of June, 1884, and the Supreme Court of the State erred in affirming said judgment of the Court below.

4. The Supreme Court of the State erred in deciding that the land in dispute was within the exterior boundaries of the grant.

5. The Supreme Court erred in not deciding that the Secretary of the Interior had no legal power in 1884 to cancel and annul the decision of his predecessor, made on the 9th of January, 1879, which held that the land in dispute was not within the exterior boundaries of the grant.

6. The Supreme Court erred in not holding that the defendant had forfeited his right to the land by his sale of a part thereof, to George W. Whitman.

7. The Supreme Court erred in deciding that as to the sale to Whitman, the allegation was one of law, and not of a fact (Trans, p. 17). See Trans., p. 17, parag. 9, where the allegation is:

> And that said defendant and his wife conveyed a part of said land, included in his homestead claim, to George W. Whitman, on the 9th day of July, 1874, which deed of conveyance is now of record in said County, and that no reconveyance has been made to said defendant by said Whitman, nor by any other person.

8. The Supreme Court erred in deciding that it was necessary to allege in the complaint that said conveyance was proved to have been made before the land officers and found to be true, and that the Secretary decided that it did not operate to forfeit the defendant's right.

9. The Supreme Court erred in deciding that the section of the Statute prohibiting any sale of any part of the homestead claim, refers only to proceedings taken after the homestead claim is filed.

10. The Superior Court, and the Supreme Court of the State erred in not deciding that when defendant entered for the first time on the land, in 1870, it was not free from the adverse right and *adverse possession* of Mann, and that defendant was therefore a trespasser, and entitled to no right to the land which was included within the possession of Mann of the 160 acres marked and staked out.

11. The Supreme Court erred in deciding that it was necessary to show in the complaint what part or how much land was sold to Whitman, and to allege affirmatively that the land was not conveyed for a family burying ground.

POINTS AND AUTHORITIES.

I.

After the United States official survey of the Agua Caliente grant was made, approved in 1870, publication thereof made; objections thereto filed by de-

fendant and others; decision made thereon by the Commissioner of the United States Land Office, Februrary 21st, 1878; and the confirmation thereof by the Secretary of the Interior January 9th, 1879, was a final judgment on the question of exterior boundaries of said grant. It became *res adjudicata* between the parties hereto and between the government and the whole world. The defendant there had his day in Court and was bound by the results. The Secretary being the highest officer of the Land Department, there was no further appeal to be taken.

When the Secretary's successor in office cancelled and annulled said decision on the 2d of June, 1884, he exceeded his authority, and his act was void. *Noble* vs., *Union River Logging Railroad Company*, 146 U. S. Rep., p. 165. This Court said in *United States* vs. *Stone*, 2 Wall., 525, 535 :

> One officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a Court.

When the foregoing proceedings were had before the Land Department, on the question of the correctness of the final survey of the Pina grant, the *Government* was a party, and the whole world had notice by publication in accordance with the law; the defendant appeared and made objections, and everybody else had an opportunity to appear. The Land Commissioner and the Secretary of the Inte-

rior then held that the land in dispute was not within the exterior boundaries of the grant. Subsequently, when nobody but the parties to this suit were before the Land Department, the Commissioner of the Land Office affirms said decision, but on appeal to the Secretary in 1884, he *reverses the decision of his predecessor*. We submit that such a reversal has no foundation in law or equity, and no principle of jurisprudence can sustain it.

II.

Let us examine into the merits of the question as to the construction of the exterior boundaries. The defendant claims that the *top* of the hills and mountains on the east, were the eastern *exterior* boundary of said grant, and that *within* the land was the exterior boundaries of the grant.

Plaintiffs assume the position that the "hills and mountains" are no part of the boundary of the grant (unless the foot thereof be so considered); that the arryo described in the grant was the western boundary, and the quantity granted being limited to 2½ leagues in length, and one-fourth of a league in width, the eastern *exterior* boundary was, and is, the line run by the Government Surveyor Lewis, parallel to the general course of said arroyo, one-fourth of a league distant therefrom. That line, as a matter of *law*, was fixed by the grant and decree of confirmation, as the exterior eastern boundary. Where

that line would run, was a matter of *fact* to be ascertained by survey.

What are boundaries is a matter of *law; where they are* is a matter of *fact.* *Boten* vs. *Lann*, 16 Tex., 96.

Where the boundary lines of a grant are fixed by the grant itself, the question as to what these lines are is purely one of law. *Magee* vs. *Hallett*, 22 Ala., 699; *Burnett* vs. *Thompson*, 13 Ired. (N. C. L.), 379; *Cockerell* vs. *McQuinn*, 4 T. B. Mon. (Ky.) 63.

The Aqua Caliente grant was confirmed by the United States Courts as follows:

> The land of which confirmation is made, is situated in the present County of Sonoma, and is of the extent of two and a half leagues in length, by a quarter of a league in width, and known by the name of Aqua Caliente, and is bounded on the southwest by the arroyo of the Rancho of Petaluma; on the southeast by the town of Sonoma; on the north (meaning east) by the hills and mountains which intervene and separate the rancho of George Yount, and on the northwest by the rancho of Mr. John Wilson, being the same land which was granted to Lazaro Pina by Governor Alvarado.

The *locus* of the land granted was defined on the *west* and *east* definitely, that is, the arroyo on the west and a line on the east which would be distant one-fourth of a league therefrom; and only that distance. If the words "on the north (meaning east) by the hills and mountains" had been left out of the grant, the grantee would have received just the same

land, and *no more*, than he did receive with said words included.

The truth is, the *eastern exterior* boundary of the grant, as a matter of *law*, was known the moment the grant was executed. As a matter of *fact*, the location of said boundary might have been ascertained by a *survey*.

In the case of the *United States* vs. *Halleck*, 1 Wall, 439, the Court said :

> The material question for determination is whether the survey approved conforms to the decree of confirmation. When such decree describes the tract of land to which the claim is confirmed with precision, by giving *a river on one side, and running the other boundaries by courses and distances*, a reference at the close of the decree to the original title papers for a more particular description, *will not control the description given*.

So in the case at bar, the tops of the *hills and mountains* will not control the description of two and one-half leagues in length *and one-fourth in width*. The words "hills and mountains" cannot change the natural import of the language used of measurement, to wit, *one-fourth of a league*.

The words " hills and mountains " were mere surplusage unless the *foot* thereof was meant. As this Court said in the case *supra :*

> From the data thus furnished, the boundaries, which are not designated, *can be readily ascertained and declared*.

> It is a rule of law that if an estate is clearly and explicitly described in a deed of conveyance and a subsequent clause is introduced as further descriptive of the estate, but which is of *doubtful import*, or *repugnant* to the first clause, such latter description will be rejected (*Cutler* vs. *Tuft*, 3 Pick., 272; *Cartwright* vs. *Amatt*, 2 Bas. & Pul., 4331; Am. Decisions, 226).

Now in this case, the distance of a quarter of a league in width from the arroyo is repugnant to the other call of "hills and mountains," unless the *foot* thereof was intended.

In *White* vs. *Gay*, 9 New Hamp., 126, the Court said:

> Where the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best subserve *the prevailing design manifested on the face of the deed*; and the certainty must yield to the great certainty in the description (*Cholmondely* vs. *Clinton*, 2 Barn. & Ald., 625).

The *first* call in the grant is the arroyo. *That* was the *starting* point in the line of measurement.

A water course named in a grant will control, 4 Wh., 444; *Brown, et al*, vs. *Huger*, 21 How., 305.

In *Mayre* vs. *Tappan*, 23 Cal., 309, the Court said:

> The location of the line on the surface of the ground was well known by both parties, or *could have been readily ascertained;* and the defendants therefore had the means of ascertaining by means of a survey, the exact location of

> the line in the tunnel, and they *were guilty of negligence in not informing themselves of this fact.*

So in the case at bar, the defendant was guilty of negligence in not aseertaining by survey where the line of one-quarter of a league east of the arroyo mentioned in the grant would run.

John Mann ascertained the fact as to the distance of one-fourth of a league east from the arroyo, and settled outside of that line. The defendant had the like opportunity of knowing where the line would run.

In *Carr* vs. *Quigley*, 149 U. S., 661, this Court said:

> Where a Mexican grant was for a *specific quantity* within an area containing a much larger quantity, it was *only the quantity actually which was reserved from the disposition by the Government* during the examination of the validity of the grant; *the remainder was at its disposal as a part of the public domain.* * * The Supreme Court of California acted upon the theory that the exemption from sale extended to all lands within the exterior boundaries of the grant instead of merely to the *amount specifically granted*, but as we have shown, this was an erroneous view to be taken of the case after the decision of the *United States* vs. *McLaughlin.*

So in the case at bar, *no more* than 2½ leagues in length by one-quarter in width, could possibly have been claimed or excluded from the public domain ;

and the remainder was at the disposal of the Government as a part of the public domain. "The grant does not operate before such location, to exclude the whole *tract from pre-emption or sale, etc. Castro* vs. *Quigley, supra.*

III.

The allegations in the complaint, and admitted by the demurrer, show that the defendant did not bring himself within the provisions of Section 7, of the Act of July 23d, 1866, which reads as follows :

> That where persons in *good faith,* and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have been subsequently rejected, or where the lands so purchased have been excluded from the final survey of the Mexican grant, and have used, improved, and continued in the *actual possession* of the same, according to the lines of the original purchase, and when no valid adverse right or title (except the United States) exists, such purchaser may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, etc.

The allegations in the complaint are that John Mann, in the month of February, 1863, entered in good faith upon and settled upon, and did possess in good faith, a certain tract of public land of the United States, containing 160 acres, with proper meets and bounds, and resided thereon until his death in 1872, etc. (Trans., p. 6.) That the de-

fendant entered on a portion of said 160 acres of land while the said John Mann and his family were living thereon, against the will and consent of the said John Mann, and against the will and consent of said plaintiffs, in the year 1870, and *not earlier*, and continued thereon against the will and consent of said John Mann and of said plaintiffs.

These facts are admitted by the demurrer.

How could the defendant have entered in good faith, "and continued in the *actual* possession of the same according to the lines of his original purchase," when Mann was in the actual possession of 160 acres described by meets and bounds, including the land in question?

Was not Mann in actual possession, claiming an "*adverse right*" to defendant?

Mann was in the *actual* possession of the 160 acres since 1863—*three years before* the Act of July, 1866, was passed.

> Possession is adverse when there is such appropriation of the land to an individual as will apprise the community in the vicinity that the land is in the exclusive use and enjoyment of such person. (*Morrison* vs. *Kelly*, 74 Am: Decis., 169.)
>
> Open and notorious possession of a settler on public land, under the Act of May 29th, 1830, is notice to all the world of his equitable right of pre-emption. (*Bruner* vs. *Manlove*, 36 Am. Decis., 551.)

> A party whose possession was acquired by intrusion upon prior rights of another, cannot invoke the protection of the Van Ness Ordinance by which the City of San Francisco relinquished and granted all her claim and title to certain lands to the parties in the actual possession thereof, by themselves or tenants, during the period named in the Ordinance. (*Kean* vs. *Carnovan*, 21 Cal., 290.)

This Court, it would seem, has already settled the point in the case of *Cox* vs. *McGarrahan*, 9 Wall,. 298, wherein the Court said :

> A claimant under a *rejected Mexican claim* should prove that he continued in the *actual possession* of the land, and that *it was free from any adverse private right or title.*

This Court has so often held that a pre-emptioner or homesteader cannot enter upon land in the *possession of another* and acquire any rights therby that it would seem unnecessary to cite the authorities thereon. But see *Atherton* vs. *Fowler*, 96 U. S., 513 ; *Quinby* vs. *Conlan*, 104 U. S., 420 ; *Mower* vs. *Fletcher*, 116 U. S., 380.

IV.

The defendant forfeited his right by selling a part of the land within his homestead claim to Whitman.

It was unnecessary to allege in the pleading or complaint how much was sold; selling *any part* is in

violation of the statute. The allegation is in the language of the statute. It has always been considered the safest to adopt and follow the very words of the law. *Ford* vs. *Babcock*, 2 Sand., 523; *Thomas* vs. *People*, 19 Wend., 480. Even in an indictment or information, an averment in the language of the statute is good. Section 2288 of the Revised Statutes gives the right of sale with a *proviso*. When a pleader wishes to avail himself of a statutory privilege, he must show the facts that entitle him to the privilege or proviso. When the plaintiffs alleged a sale of *a part* of the homestead claim to a *private individual*, he stated a *prima facie* case showing a forfeiture; and the plaintiffs were not required to allege anything in anticipation. It was for the defendant to have answered, and said to the Court:

> It is true I sold a part to Whitman (if true), to hold as a trustee for *one* of the purposes mentioned in the statute. (See *Radcliffe* vs. *Raveley*, 2 Barb. Chan., 23.)

Section 2291 of the U. S. Revised Statutes provides:

> That he, she, or they, makes affidavit that *no part* of such land *has been alienated*, except as provided in Section 2288, is as follows: Any person who has already settled, or hereafter may settle on the public land, either by pre-emption or by virtue of the homestead law, or any amendment thereto, shall have the right to transfer, by warranty against his own acts, any

> Sec. 3108. The inhabitants of any city, town, village or neighborhood may, by subscription or otherwise, purchase or receive by gift or donation, lands not exceeding five acres, to be used as a cemetery, the title thereof to be vested *in such inhabitants*, and when once dedicated for burial purposes must thereafter be used for no other purposes.

Thus it appears by the Political Code of California, as well as by the U. S. Revised Statutes, that *cemetery* purposes are *public* purposes; and therefore a sale made to a private individual of a tract of land, is a sale *prima facie, not* for *public* purposes.

It is affirmatively alleged in the complaint that defendant and his wife conveyed a part of the land included in his homestead claim, to George W. Whitman, on the 9th day of July, 1874. (Trans., p. 7, paragraph 9.)

We think the Supreme Court was in error in deciding that:

> It should have been alleged not only that the conveyance was made, but that the fact that it was made was proved before the land officers and found to be true, and that nevertheless the Secretary decided that it did not operate to forfeit the defendant's rights. (Trans., page 17.)

Suppose as a fact, the conveyance had been made at the date mentioned, and not put on record, and that the plaintiffs were not aware of the fact until the bringing of this suit, would not the plaintiffs

have had the right to allege the sale in the complaint and if proved true to have defeated the defendant on that ground? Certainly they would, because in that case it would appear that the defendant had received his patent in violation of the statute; and he not being entitled to the patent, plaintiffs would have been.

> No right can be acquired under law, which is not pursuant to it. A location of land is not under the law unless it conforms to it. (*Mills* vs. *Stoddard*, 8 How., 345; 2 How., 284.)

In proceedings before the Department, if it appears that the claim of the moving party *is against public policy or the law*, it should be *disregarded*, although such objection was not raised by the allegations of the parties (*Lee* vs. *Johnson*, 116 U. S., 48).

The Government is interested in having the law carried out as regards the public lands.

There are two objects the government has in its disposition of the public lands under the pre-emption and homestead laws. First, to make homes for poor families. Second, that those homes may be cultivated and improved, thereby enriching the State. Now, if the homesteader can sell a part, he can sell all to speculators who may let the land lie idle for years, and thereby defeat the object of the law.

The Supreme Court of the State was also in error in deciding that the sections of the Revised Statutes

cited refer only to proceedings taken after the homestead claim is filed (Trans. p. 18). The Statute refers *to all past time.* He must make affidavit that *no part* of such land *has been alienated* except as provided in Section twenty-two hundred and eighty-eight (Sec. Rev. Stat., 2291).

No one should be permitted to obtain favors under the homestead law, unless he clearly places himself within the spirit and intention of the law. The views of this Court on that point were very clearly expressed in the case of *Swith* vs. *Townsend,* 148 U. S., 490, in the following language:

> That portion of a homestead law which describes the qualifications for entry, is to be liberally construed, in order that *no one be permitted to avail himself of the bounty of Congress, unless evidently of the classes Congress intended should enjoy that bounty.*

It is respectfully submitted that the judgment of the Supreme Court of California should be reversed.

FREDERIC HALL,
Attorney for Plaintiffs in Error.

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